Filed 1/27/10 Babcock v. City of Laguna Beach CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRENTON R. BABCOCK et al.,	
Plaintiffs and Respondents,	G041235
v.	(Super. Ct. No. 06CC11494)
CITY OF LAGUNA BEACH,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Andrew P. Banks, Judge. Reversed.

Rutan & Tucker and Philip D. Kohn for Defendant and Appellant.

Sheppard, Mullin, Richter & Hampton, Sean P. O'Connor, Brian B. Farrell; and Brenton R. Babcock for Plaintiffs and Respondents.

* * *

Defendant City of Laguna Beach appeals from a judgment in favor of plaintiffs Brenton R. Babcock and Diane L. Babcock that invalidated application of a zoning ordinance to a portion of plaintiffs' real property. It relies on several procedural grounds, including issue preclusion, the statute of limitations, and ripeness. Litigation of the claim was not precluded but we agree it was barred by the statute of limitations because plaintiffs' challenge to the ordinance was filed well beyond the applicable statute of limitations. Further, the action is not ripe because the ordinance has not yet been applied to plaintiffs' property. We reverse on those grounds.

FACTS AND PROCEDURAL HISTORY

In 2002 plaintiffs purchased vacant land in Laguna Beach with the intent to build a home. As part of the purchase plaintiffs also obtained an access easement. In 2004 plaintiffs purchased the adjacent real property over which the easement ran, referred to as the Cerritos Parcel, which is part of a larger parcel referred to as the Cerritos Property.

In 1977 as part of approval of a parcel map in connection with a development project by a third party, defendant required the Cerritos Property to be dedicated as "permanent open space." That dedication included a road easement over the Cerritos Parcel. In 1993 defendant adopted an ordinance (zoning ordinance) changing the zoning on several properties, including the Cerritos Property, from R-1 residential to open space/conservation.

In 2005 plaintiffs submitted an application for a lot line adjustment to change the boundaries of their two properties to combine them into one parcel. Defendant's staff recommended that the planning commission approve it, subject to some revisions, including deletion of all references to the easement, and imposition of four conditions. One condition was that the Cerritos Parcel "be maintained as a natural open

space area" that could be changed only "for fuel modification and/or geologic maintenance purposes on specific City approval."

After a series of hearings and supplemental reports, defendant's planning commission recommended to the city council that the lot line adjustment be approved, subject to certain conditions, declarations, and findings. Declaration number 14 referred to the dedication of the Cerritos Property, reiterating what was set out in the original staff report, that the Cerritos Parcel, as part of that larger Cerritos Property, was required to be open space. It also stated defendant "question[ed] the existence or usability of a road easement," noting there had been no resolution of the parties to that effect. It further set out that the lot line adjustment was not an admission of the superiority of the easement over the open space dedication.

Declaration number 16 echoed this sentiment, stating defendant "expressly does not accept, adopt or acknowledge the existence, validity, nature or scope of . . . easements" shown in drawings accompanying the lot line adjustment application. Plaintiffs objected to both declarations. The city council ultimately adopted an ordinance (lot line ordinance) approving the lot line adjustment to include the planning commission's declarations, including numbers 14 and 16.

Plaintiffs then filed a petition for writ of mandate seeking, among other things, to void declarations number 14 and 16 of the lot line ordinance. They also challenged defendant's zoning of the Cerritos Parcel as open space/conservation, seeking to have the parcel rezoned to residential. Plaintiffs alleged that the zoning ordinance was invalid, both because it conflicted with the designation of the property as residential in defendant's general plan and because there had been no properly noticed public hearing or official action changing the zoning. The petition also included a cause of action for declaratory relief seeking a determination as to the validity of the open space zoning and the easement.

The writ petition was heard before the declaratory relief cause of action. At the first hearing on the writ a question arose as to whether and when there had been a rezoning of the Cerritos Parcel and the hearing was continued. Thereafter, defendant provided previously unproduced documents, including the zoning ordinance.

At the continued hearing, the court denied the petition, finding the challenge to declarations number 14 and 16 in the lot line ordinance was not appropriate for a writ. In so doing, it ruled that the two paragraphs were not necessary for approval of the lot line adjustment and had no effect on the outcome of the application. Rather, they were only statements of the existence of a dispute between the parties. The court also found that plaintiffs had established the existence of a controversy sufficient to justify a hearing on the declaratory relief claim. The court allowed plaintiffs to amend their petition to challenge the zoning ordinance as applied to the Cerritos Parcel.

After trial on the declaratory relief claim, the court ruled in favor of plaintiffs. The judgment declares that the easement is valid and "may be used by [plaintiffs] (or their successors) for its intended purpose, namely providing road . . . and utility access across the Cerritos Parcel . . . to [plaintiffs'] adjacent . . . [p]roperty, subject to obtaining development entitlements and any other legally required permits, approvals or authorizations . . . [.]" The judgment also states "[t]he Cerritos Parcel underlying the . . . [e]asement is not subject to [defendant's] claimed Open Space/Conservation zoning, but instead retains its . . . [r]esidential . . . zoning[.]" One judgment was entered encompassing the rulings on the writ and the declaratory relief claim.

DISCUSSION

1. Issue Preclusion

Defendant argues the denial of the writ petition in which plaintiffs challenged the open space zoning of the Cerritos Parcel precluded the court from ruling on that issue in the trial on the declaratory relief claim. We are not persuaded.

The court's ruling on the writ petition was limited to plaintiffs' attack on declarations number 14 and 16. Those dealt with the validity of the road easement, not the zoning. And the ruling merely stated the challenge to those declarations was not appropriate for a writ petition.

At the hearing on the petition the court at least two different times specifically stated that it was reserving the issue of the validity of declarations number 14 and 16 for the declaratory relief trial. The tentative ruling that became the order also stated the declarations "establish[ed] an actual and present controversy subject to declaratory relief . . . ."

Defendant points to language in the tentative ruling where the court "note[d]" that the challenge to the Cerritos Parcel's zoning was barred by the statute of limitations. But, as plaintiffs argue, this language was unrelated to the two declarations. In fact, the court made the statement in the tentative after it explained plaintiffs had "withdrawn the request for mandamus relief regarding the zoning" and it specified "there are no issues remaining for the [c]ourt to determine at this time." Further, during trial defendant's counsel acknowledged that declaration number 14 had nothing to do with zoning.

In addition, in an argument prior to trial, the judge stated that no judgment had been entered and until that time "I get to change my mind as many time as it changes." The judge observed that the writ had focused on removing the declarations from the document approving the lot line adjustment. The judge also said he had

"always . . . inten[ded] that while we may not get to [issues] on the writ of mandate petition, we may get to them . . . in the declaratory relief action. And while for purposes of [the] writ of mandate I wouldn't grant it then in this, the very same case, I may address them in the declaratory relief action." He continued that if defendant acted to "use the open space ordinance to affect the validity, existence, nature or scope of the easement[,] . . . by declaratory relief [we will] address [that]."

Thus, contrary to defendant's argument, plaintiffs did not get a "'second bite at the apple'"; the issue was litigated once, at trial, and was not precluded by the decision on the writ petition.

2. Statute of Limitations

Defendant argues that plaintiffs' challenge to declarations number 14 and 16 in the lot line ordinance is barred by the statute of limitations. We agree.

Declaration number 14 describes defendant's 1977 approval of the parcel map requiring the Cerritos Property to be dedicated as open space and refers to the reservation of the road easement over the Cerritos Parcel. It continues, stating that defendant "questions the validity and effect of the easement and reservation," but specifically provides that "the issue has not been and is not hereby finally determined." Declaration number 16 refers to the exhibits attached to the lot line adjustment application that depict certain easements, stating defendant "expressly does not accept, adopt, or acknowledge the[ir] existence, validity, nature or scope . . . ."

Government Code section 65009, subdivision (c)(1)(E) (section 65009 (c)(1)(E)) declares that, except in circumstances not relevant here "no action . . . shall be maintained in any of the following cases . . . unless . . . commenced and serv[ed] . . . within 90 days after the legislative body's decision: [¶] . . . [¶] (E) To . . . determine the reasonableness, legality, or validity of any condition attached to . . . any other permit."

That time limitation is "absolute." (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1123, 1125.)

Plaintiffs' declaratory relief action challenged the zoning ordinance that rezoned the Cerritos Parcel from residential to open space. That ordinance was enacted in 1993. Clearly, the writ petition filed in 2006 was well beyond the limitations period. Plaintiffs argue, however, that they are attacking the ordinance "as applied" by its inclusion in declarations number 14 and 16 and that because their action was filed within 90 days after the lot line ordinance was passed, they are within the time period set out in section 65009 (c)(1)(E).

In support of their argument plaintiffs rely on *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757. In *Travis* the two property owners questioned application of certain conditions included in a building permit. They claimed the ordinance on which the defendant relied to impose the conditions was preempted by state statutes. Although one property owner's lawsuit was filed within 90 days after issuance of the permit, it was 18 years after the ordinance had been enacted, and the defendant claimed the action was barred by the statute of limitations. Relying on section 65009 (c)(1)(E) the Supreme Court disagreed. It decided that because the plaintiffs filed their action "within 90 days of final administrative action on [their] permit" it was "timely as to [one property owner's] claim the conditions imposed on [the] permit are invalid." (*Travis v. County of Santa Cruz*, *supra*, 33 Cal.4th at p. 767.)

Travis does not help plaintiffs. Here there has been no "application" of the zoning ordinance to plaintiffs' property. Plaintiffs have not applied for a permit and consequently defendant has made no decision on such an application. The lot line ordinance merely recites defendant's position as to the terms of the zoning ordinance and the easement; it does not apply them. Furthermore, declaration number 14 specifically acknowledges the issue is unresolved. There has been no final determination of the zoning ordinance or easement as applied to plaintiffs' property.

Plaintiffs also rely on Government Code section 65009, subdivision (c)(1)(F), which provides a 90-day statute of limitations for legislative decisions "[c]oncerning any of the proceedings, acts, or determinations taken, done, or made prior to a[] . . . decision[] listed in subparagraph[] . . . (E)." They point to defendant's staff reports, that included conditions that were relabeled declarations and findings in the final version of the lot line ordinance, and their opposition to those reports. Other than their displeasure at defendant's views and the expressions of them in staff reports, plaintiffs are not challenging those "prior" actions as distinct from their attack on the lot line ordinance. This section does not apply.

Because the zoning ordinance has not been applied to plaintiffs' property, effectively the only act plaintiffs are challenging at this point is the adoption of that ordinance, which was substantially earlier than 90 days before the action was filed. As is plain and as defendant specifically admits, both in the lot line ordinance and its briefs, this issue has not yet been determined. At oral argument defendant's lawyer specifically stated that defendant's recitals in declarations number 14 and 16 in the lot line ordinance that "question[ed] the validity and effect of the easement" had "no legal effect at all" and were not material to the lot line ordinance. When and if plaintiffs apply for a development permit and either or both of the zoning ordinance and the alleged invalidity of the easement are applied, plaintiffs will have the opportunity to timely challenge them. Because defendant appealed only on the basis of the statute of limitations, plaintiffs' substantive and procedural challenges to the validity of the zoning ordinance are not at issue.

3. Ripeness

For a declaratory relief action to be ripe there must be an "actual controversy" (Code Civ. Proc., § 1060), defined as "one which admits of definitive and conclusive relief by judgment within the field of judicial administration . . . ." (*Selby*

Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 117.) Plaintiffs contend the action is ripe because it comports with the two-pronged test generally used to analyze this issue: 1) The issue is concrete enough to lend itself to definite relief (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171); and 2) "'withholding court consideration'" would create "'hardship to the parties'" (*id*. at p. 172). But the facts of this case do not satisfy either prong. What plaintiffs characterize as a "factual determination" that the lot line ordinance established the existence of a controversy does not make it so.

As discussed above, plaintiffs have not applied for a permit and, consequently, defendant has not taken any action on it. As stated in *Pacific Legal*, where the court held the controversy was not ripe (*Pacific Legal Foundation v. California Coastal Com., supra,* 33 Cal.3d at p. 172), "[i]t is true that the parties' interests are adverse" (*ibid*.), but no "'administrative decision has been formalized and its effects [have not been] felt in a concrete way by the challenging parties'" (*id*. at p. 171).

Plaintiffs assert they need not apply for a permit for the issue to be ripe, citing *California Alliance for Utility Safety and Education v. City of San Diego* (1997) 56 Cal.App.4th 1024. That case discussed *Alameda County Land Use Assn v. City of Hayward* (1995) 38 Cal.App.4th 1716, where "[t]he municipalities argued that no controversy would exist until the property owners had applied for and been denied a land use permit." (*California Alliance for Utility Safety and Education v. City of San Diego, supra,* 56 Cal.App.4th at p. 1029.) *California Alliance* noted that the *Alameda County* court "rejected this argument" because "'[a]n action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law. [Citations.]' [Citations.]" (*Ibid*., italics omitted.)

Plaintiffs highlight the language dealing with a municipality acting in violation of the law. But the true dispute here is whether the zoning ordinance was

properly enacted and applied to the Cerritos Parcel. Although plaintiffs may characterize this as a violation of law, that is not the gravamen of the action.

Plaintiffs also point to language in *California Alliance* that the defendant's "failure to concede that the facts alleged . . . constituted a violation of the Brown Act . . ." was sufficient to make the controversy ripe. (*California Alliance for Utility Safety and Education v. City of San Diego, supra,* 56 Cal.App.4th at p. 1030.) The allegations there were quite different, however. The plaintiffs claimed the defendant had engaged and continued to engage in violations of the Brown Act. That was concrete action to which a specific and definite solution was available. Moreover, that defendant here continues to rely on its views as to the easement and open space zoning, stating that position in the lot line ordinance is not determinative. Defendant acknowledges in that ordinance that the controversy has not been resolved.

While we recognize the significant time and expense they have expended to date, plaintiffs have not suffered the requisite hardship to satisfy the second prong of the test. (*Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at p. 173 ["hardship inherent in further delay is not imminent or significant enough to compel an immediate resolution of the merits"]; see also *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d at pp. 120-121 [insufficient showing of hardship where only official act was adoption of general plan, which the plaintiff claimed would result in taking of property; condemnation action was necessary prerequisite].)

In sum, the "difference of opinion [between the parties] as to the[] validity[and effect of the zoning ordinance and the easement] . . . is obviously not enough by itself to constitute an actual controversy. [Citations.]" (*Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at p. 173.) If, when plaintiffs seek a development permit, defendant applies either or both of the zoning ordinance and the claimed invalidity of the easement, the issue will be ripe for challenge.

Because we decide the case on the above grounds we need not discuss failure to exhaust administrative remedies and failure to demonstrate the probability of a different result, also raised by defendant in its briefs.

DISPOSITION

The judgment is reversed. Appellant is entitled to its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.